STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 96G020

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DAVID CAIN, KATHY DEAN, ROBERT SOCOLOFSKY, and BILL WHITACRE,

Complainants,

vs.

DEPARTMENT OF PERSONNEL,

Respondent.

This matter came on for hearing on May 3, 1996 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by John D. Baird, Assistant Attorney General. Complainants appeared and represented themselves.

The parties agreed that the issue for determination is a question of law which can be decided on the written submissions of the parties and without live testimony. The parties jointly tendered written stipulations to the pertinent facts. Exhibits A through G attached to complainants' previously filed Information Sheet were also stipulated into evidence. Complainants' opening brief was made due on May 24, 1996. Respondent's answer brief became due on June 13, and complainants' response brief by June 24. All briefs were timely filed. The hearing concluded on June 20, 1996 with the filing of the final pleading.

MATTER APPEALED

Complainants appeal their being denied the 1995 salary survey pay increase.

ISSUE

Whether the action of the respondent was arbitrary, capricious or contrary to rule or law.

PROCEDURAL HISTORY

On August 31, 1995, complainants petitioned the State Personnel Board for an evidentiary hearing to review the decision of the Department of Personnel pertaining to complainants' reclassification pursuant to the PDO process and the implementation of the salary survey. Complainants filed their information sheet in a timely manner. Respondent did not file an information information sheet. Based upon the complainants' administrative law judge issued sheet, an a preliminary recommendation to grant an evidentiary hearing. On March 19, 1996, the Board voted to adopt the preliminary recommendation and granted the petition for hearing.

FINDINGS OF FACT

The following facts and matters were stipulated into evidence:

- 1. All Complainants are certified employees of the State of Colorado, working as ALJ IIs in the Industrial Claim Appeals Office of the Department of Labor and Employment.
- 2. At the time of their petition, the position of ALJ II was classified as Grade 109 in the Professional Services Occupational

¹ Stipulated facts are conclusive upon the parties and the tribunal. <u>Faught v. State</u>, 162 Ind. App. 436, 440-1, 319 N.E. 2d 843, 846-47 (1974).

Group.

- 3. The ALJ II designation was achieved on January 1, 1995, as a result of the Phase II placement conducted pursuant to section 24-50-104(3), C.R.S., in which the Department undertook to evaluate the placement of positions of all state classified employees to various classes. Complainants' placements resulted in a one grade increase because of an appeal of their initial placements, and another one grade increase as a result of the 1995 salary survey.
- 4. The 1995 salary survey recommended an approximate 2.5% increase for the Professional Services group, which was implemented by the General Assembly. Similarly, the other nine occupational groups for the classified employees were also adjusted according to recommendations made in the annual total compensation survey, i.e., the salary survey.
- 5. Raises for certified employees who received an increase of one grade as a result of class placement, and whose anniversary dates fell between January 1995 and June 1995, were determined pursuant to the Personnel Director's Administrative Procedures, Chapter 3, and the Board Rules, Chapter 3.
- 6. The General Assembly, the Personnel Board, and the Executive Branch intended that the Job Evaluation System Redesign Project (both Phase I and Phase II) be cost neutral.
- 7. Immediately prior to January 1, 1995, David Cain was employed as an ALJ I-C in the Industrial Claim Appeals Office. He was paid at Grade 107, Step 6, earning \$5,640 per month. His anniversary date is August 1. On January 1, 1995, Cain was placed in Grade 108, between Steps 5 and 6, earning \$5,640 per month. This change resulted from Cain's successful appeal of his placement under

Phase II of the job evaluation project. As of January 1, 1995, Cain's position was allocated to ALJ II. On July 1, 1995, the Department of Labor and Employment's Office of Human Resources elevated Cain to Grade 109, Step 5, at a salary of \$5,640 per month, pursuant to the annual salary survey and the Personnel Director's Administrative Procedure P3-1-1 and Board Rule R3-2-3.

- 8. Hypothetically, had Cain not won his appeal in Phase II, and were an ALJ I, Step 6 in July 1995, he would have earned \$5,794 per month as a result of the salary survey adjustment.
- 9. On August 1, 1995, Cain received an anniversary increase to Grade 109, Step 6, resulting in a salary of \$5,922 per month.
- 10. Kathy Dean was appointed as an ALJ 1-C for the Industrial Claim Appeals Office on December 14, 1992, as a permanent parttime employee. Her anniversary date was subsequently changed from January 1 to July 1 with the explanation that the change was necessitated by the fact that she was hired during a frozen year pursuant to SB 92-68. On July 1, 1994, the implementation of the salary survey and anniversary increase placed her at Grade 107, Step 4, which specifies a compensation rate of \$29.515 per hour. Dean appealed the placement of her position to ALJ I, resulted in her position being placed at ALJ II. January 1, 1995, she was placed in Grade 108, in between Steps 3 and 4, which specifies a compensation rate of \$29.515 per hour. On July 1, 1995, Dean was moved to Grade 109, Step 3, at a compensation rate of \$29.515 per hour. On the same date, Dean received an anniversary raise and was moved to Grade 109, Step 4, at a compensation rate of \$30.987 per hour.
- 11. Hypothetically, had Dean not won her appeal in Phase II, the pay grid indicates that, on July 1, 1995, Dean, as a result of the

salary survey adjustment, moved to Grade 108, Step 4, with a compensation rate of \$30.323 per hour, and would have received an anniversary raise to Grade 108, Step 5, with a compensation rate of \$31.835 per hour.

- Robert Socolofsky was appointed as an ALJ I in the Industrial Claim Appeals Office on May 1, 1994. He had been an Appeals Referee I in the Division of Employment and Training in the Department of Labor and Employment, with an anniversary date in state service of August 1, 1988. Upon entry to the ALJ I position, Socolofsky was assigned to Grade 106, Step 1, which specifies a salary of \$4,324 per month. Upon implementation of the 1994 salary survey, on July 1, 1994, he was moved to Grade 107, Step 1, at a salary of \$4,419 per month. On his anniversary date, August 1, 1994, Socolofsky was moved to Grade 107, Step 2, which specifies a salary of \$4,640 per month. On January 1, 1995, as a result of Phase II, he was moved to Grade 108, in between steps 1 and 2, with no immediate change in salary. On July 1, 1995, he was moved to Grade 109, Step 1, and his salary remained at \$4,640 per month, which is the salary specified for that grade and step. On August 1, 1995, he was moved to Grade 109, Step 2, with a salary of \$4,872 per month.
- 13. Hypothetically, had Socolofsky not won his appeal in Phase II, without the Phase II increase of one grade, Socolofsky's rate of pay would have remained at Grade 107, Step 2, at \$4,640 per month, until July 1, 1995. At that point, the salary survey adjustment would have moved him to Grade 108, Step 2, at \$4,767 per month. On August 1, 1995, his anniversary date would change him to Grade 108, Step 3, at \$5,005 per month.
- 14. Whitacre's anniversary date is November 1, 1983. On July 1, 1994, Whitacre was placed in Grade 107, Step 7, with a salary of

- \$5,922 per month. With the Phase II placement of his position, he was moved to Grade 108, between Steps 6 and 7, and his salary remained unchanged. On July 1, 1995, he was moved to Grade 109, Step 6, and his salary remained unchanged. On November 1, 1995, Whitacre was at Grade 109, Step 7, where the salary is \$6,218 per month.
- 15. Hypothetically, had he not won his appeal in Phase II, Whitacre would have been placed in Grade 108, Step 7 on July 1, 1995, at a salary of \$6,084 per month.
- 16. The parties stipulate that if the witnesses listed in Respondent's Prehearing Statement were to testify, their testimony would be substantially as follows:
- a. Classified employees in the Professional Services group whose anniversary date is between January 1995 and June 1995, and who were placed one grade higher as a result of Phase II, received a raise in pay as a result on their anniversary date as long as they were not Step 6 or higher. Those employees then received an actual raise in pay on July 1, 1995, as a result of the salary survey, assuming performance ratings of good or better. This increase is independent of the salary survey and is governed by the anniversary date, Chapter 3, Article 8, of the Personnel Director's Administrative Procedures, and the Personnel Board Rules, Chapter 3.
- b. Classified employees in the Professional Services group whose anniversary date is between January 1995 and June 1995, and who were placed two grades higher as a result of Phase II, received an actual raise on their anniversary date and an actual raise in pay on July 1, 1995, as a result of the salary survey, assuming performance ratings of good or better.

- c. Classified employees in the Professional Services group whose anniversary date is from July 1995 through December 1995, and who were placed one grade higher as a result of Phase II, received the salary survey adjustment, but did not receive an actual salary survey raise in pay on July 1, 1995.
- d. There are classified employees in the Professional Services group who were placed one or more grades higher as a result of Phase II, and whose anniversary dates are between January 1995 and June 1995. These employees received an actual raise in pay on their anniversary dates as long as they were not in Step 6 or higher, and an actual raise in pay on July 1, 1995 as a result of the salary survey, assuming performance ratings of good or better.
- e. If a classified employee's anniversary date is January 1, 1995, on January 1, 1995, he or she could receive a class placement, moving up one grade, resulting in an in-between rate, and on January 1, 1995, would receive an anniversary increase of approximately 2.5%, (moving him or her to the next closest step).
- f. If the employee's anniversary date was February through June, 1995, on January 1, 1995, he or she could receive an elevation of one grade because of class placement, resulting in an in-between rate. On his or her anniversary date, the employee would get an anniversary increase of about 2.5% to the next step.
- g. These actions result in an increase in pay due to the anniversary date procedures, which are separate from the job evaluation system study and salary survey procedures.
 - h. If the employee goes up two grades on January 1, 1995 as

a result of placement, the employee goes back one step on January 1, 1995, in order to adjust his or her pay to the same amount made before then.

- i. For example, if before January 1, 1995, the effective date for implementing Phase II, an employee were at Grade 72, Step 2, on January 1, 1995, he or she would be placed at Grade 74, Step 1 (resulting in the same amount of pay).
- j. Because the Grievants only moved one grade as a result of placement, they did not receive an actual increase in salary on July 1, 1995; however, they did receive the salary survey adjustment in grade (assuming no anniversary adjustment between January 1995 and June 1995).
- k. Employees in in-between rates also move to higher grades because of the salary survey adjustment, but they may not get an increase in actual salary on July 1, 1995.
- Employees may or may not receive an actual increase in salary depending on their position in the range, the number of grades adjusted, and, also, on the timing of individual personnel actions, such as anniversary dates. instance, For pertaining to the determination of what action recognized, would come into play where the employee's anniversary date coincided with the effective date of implementing Phase II, January 1, 1995. Position in the range refers to not allowing employees to be placed below Step 1, and whether they are in a step, between steps, or in a saved pay position.
- 17. The parties stipulate to the authenticity of the documents attached to the Complainants' Information Sheet and Supporting Exhibits.

DISCUSSION

In an appeal of an agency administrative determination, unlike a disciplinary proceeding, the complainant bears the burden to prove by preponderant evidence that the action of the respondent was arbitrary, capricious or contrary to rule or law. Renteria v. Department of Personnel, 811 P.2d 797 (Colo. 1991). See Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

Complainants first contend that the denial of the 1995 salary survey pay increase is arbitrary and capricious because there exists no rational basis for treating them differently from similarly situated employees, i.e., other members the professional services group who received the salary survey pay Complainants next contend that respondent's action is contrary to law because the denial of the salary survey pay increase resulted in a loss of to them, pay contrary Administrative Procedure P3-1-1(A). Finally, complainants submit that they have been deprived of a property interest, in violation of the Fourteenth Amendment to the United States Constitution and Colo. Const. Art. II, §25.

Respondent's position is that complainants received the benefit of the salary survey because, as a result of the salary survey, they were placed into a whole step pursuant to Administrative Procedure P3-1-1(A) when the salary survey was implemented on July 1, 1995. Respondent contends that its action was proper because it acted in compliance with the applicable statutory and regulatory requirements.

Complainants assert that the stipulated facts show that the only members of the professional services group who did not receive the

salary survey pay increase were those who received a one grade increase during Phase II and who had anniversary dates between July 1 and December 31, 1995, that those who received a one grade increase during Phase II and had anniversary dates between January and June 1995 received the salary survey increase, that complainants would have gotten the salary survey increase if their positions had been elevated two grades during Phase II instead of one, and that no rational basis exists for such differential treatment of similarly situated employees.

According to respondent, two actions affected complainants: allocation of their positions under Phase II of the Job Evaluation System Redesign Project and implementation of the salary survey on July 1, 1995. Complainants were placed into ALJ II positions, Grade 108, on January 1, 1995. They were placed in between steps to keep the project cost neutral. They were placed in an existing step at the first available opportunity under P3-1-1(A), that opportunity being the implementation of the salary survey.

Administrative Procedure P3-1-1(A), 4 Code Colo. Reg. 801-2, provides:

When placed in a saved pay rate (as defined in Board Policy 3-5-A) or a special salary rate (as defined in P12-1-26), the salary shall be moved to an existing step at the first available opportunity in a manner that does not cause a loss in pay. Examples of actions that may cause an employee to be moved out of these rates include promotion, demotion, salary survey, and anniversary date.

Administrative Procedure P12-1-26, 4 Code Colo. Reg. 801-2, defines "special salary rate" as follows:

<u>Special Salary Rate</u>: A value between current steps which can be used for saved pay situations or when a class is moved upward due to a system maintenance study or job

evaluation study.

Administrative Procedure P3-5-3, 4 Code Colo. Reg. 801-2, provides in part:

Pay Relationship Changes. When a class or class series is placed in a different pay grade due to a pay relationship change (as a result of a system maintenance study or a general study of the State Personnel System) the new compensation rate of employees in such class(es) shall be as follows:

. . . .

(B) Except as provided in (C) below, if the new pay grade is higher, the new compensation pay rate shall be the step or special salary rate which equals the employee's current salary. If the salary is below the minimum of the new grade, the employee shall be placed in a transitional step (as defined in P12-1-19)....

Rule R3-2-3, 4 Code Colo. Reg. 801-1, provides:

<u>Salary Adjustment Due to Salary Survey</u>. When the pay grade assigned to a class is changed upon implementation of a salary survey, the pay of all employees in the class shall be changed step for step to the new grade, except as provided hereafter....

Complainants have failed to establish that they were treated differently from other classified employees under the state personnel system. Complainants point to the professional services group to argue differential treatment, yet they were treated the same as the other members of the group, that is, the rules and procedures implementing Phase II and the salary survey were applied in an equal manner to all employees. The ultimate impact on one employee will not necessarily be the same as on another employee because the system takes into account individual grades, steps, anniversary dates and the like. Complainants did, in fact,

receive a grade increase pursuant to the salary survey and will, in the future, realize a monetary gain as the result of their positions having been reallocated upward to ALJ II. There has been no showing, only argument, that complainants were "singled out" for disparate treatment. To follow their argument to its conclusion leads to an attack on the entire classified personnel system. This the administrative law judge is unwilling to accept on the present record. Throughout their briefs, complainants provided no legal authorities supportive of their position, save their own interpretation of the various rules and procedures. Nowhere have they shown that respondent treated them differently from other employees; they simply disagreed with the outcome mandated by the system, which was properly implemented.

The comprehensive scheme authorizing the personnel director to develop pay plans establishing classes, positions and grades of pay based upon salary and benefit surveys and submit the results to the governor and general assembly is founded in the sound policy consideration of maintaining the fiscal integrity of the entire personnel system. <u>Dempsey v. Romer</u>, 825 P.2d 44, 56 (Colo. 1992). A party challenging a statutory classification carries the burden to prove beyond a reasonable doubt that the classification is unreasonable or unrelated to any legitimate governmental <u>Department of Corrections</u> Employees Id. at 57. Cf. Coalition v. Romer, 879 P.2d 485 (Colo. App. 1994) (legislation designed to implement study supporting salary grade reduction for employees in correctional classes did not deny those employees equal protection and bore a rational relationship to government's interest in maintaining the fiscal integrity of the personnel system).

Complainant's argument that respondent's action pursuant to P3-1-1(A) was contrary to law on grounds that it resulted in lost pay to complainants is without merit. This action, itself, did not

cause a decrease in the amount of pay complainants were receiving at the time the action was taken. Nor were complainants deprived of their property interest in public employment. They cite no authority to support their proposition that a denial of a salary survey pay increase constitutes a deprivation of a constitutional property right, and it does not. Complainants do not possess a property interest in receipt of a certain salary. Blake v. Department of Personnel, 876 P.2d 90 (Colo. App. 1994).

Complainants have thus failed to meet their burden to show that respondent's action was arbitrary, capricious or contrary to rule or law.

CONCLUSIONS OF LAW

The action of the respondent was not arbitrary, capricious or contrary to rule or law.

ORDER

Respondent's action is	affirmed.	Complainants'	appeal is
dismissed with prejudice		00.11 <u>.</u> _01_101_02	opp = 12
DATED this day of August, 1996, at		Robert W. Th	 lompson, Jr.
Denver, Colorado.	Adm	ninistrative Law	Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of August, 1996, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

David Cain
Kathy Dean
Robert Socolofsky
Bill Whitacre
Industrial Claim Appeals Office
1515 Arapahoe Street, T2-350
Denver, CO 80202

and in the interagency mail, addressed as follows:

John D. Baird
Assistant Attorney General
State Services Section
1525 Sherman Street, 5th Floor
Denver, CO 80203